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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC.,
Petitioner,

v.

OLLIE T. HILL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the named plaintiffs' failure to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure for commonality, typicality, membership in the class and adequacy of representation creates merely "technical" or "formal" defects which are cured by the named plaintiffs' success on the merits of claims they had no authority to litigate, so as to permit reinstatement of erroneously entered class findings upon post-remand intervention by allegedly qualified new class representatives?

2. Whether the Court of Appeals erred, as a matter of law, in instructing the district court to consider reinstating findings of fact and conclusions of law that were erroneously made and were vacated for want of proper jurisdiction in a prior appeal in the same litigation?

3. Whether the determination of a district court that permissive intervention by alleged applicants for employment, five years after the litigation began, would have substantially delayed further proceedings to the prejudice of the original parties to the litigation, may be set aside solely because it was contrary to the "general experience" of the Court of Appeals?

PARTIES INVOLVED

Petitioner Western Electric Company, Inc.*

Named plaintiffs Ollie T. Hill, John W. Ward, Charles R. Merriweather, Edward H. Minatee, Minnie M. Marable, and Mary E. Carter.

The class of all black persons and all female persons employed by Western Electric Company, Inc. at its facilities in Arlington, Virginia.

Proposed Intervenors Betty Bailey, Victor L. Furr, III, Darlene Johnson, and the proposed class of all blacks and all women who unsuccessfully sought employment at the Petitioner's facilities in Arlington, Virginia.

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* Western Electric Company, Incorporated is a wholly-owned subsidiary of American Telephone and Telegraph Company. Subsidiaries of Western Electric are Manufacturers' Junction Railway Company, Nassau Recycle Corporation, Sandia Corporation, Teletype Corporation and Western Electric Company, Limited (London). Fifty percent of the voting securities of Bell Telephone Laboratories is owned by Western Electric with the remaining fifty percent owned by AT&T. Western Electric also is the owner of forty-four percent of Goldstar Semiconductor Ltd., a joint venture.

Other subsidiaries and affiliates of American Telephone and Telegraph Company are set forth below:

New England Telephone and Telegraph Company

New York Telephone Company

Empire City Subway Company (Limited)

New Jersey Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Diamond State Telephone Company

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company
of West Virginia
Southern Bell Telephone and Telegraph Company
South Central Bell Telephone Company
The Ohio Bell Telephone Company
Michigan Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Wisconsin Telephone Company
Illinois Bell Telephone Company
Northwestern Bell Telephone Company
Southwestern Bell Telephone Company
Southwestern Redevelopment Corporation
The Mountain States Telephone and Telegraph Company
Malheur Home Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
Eastern Telephone and Telegraph Company
Transoceanic Communications, Incorporated
Transoceanic Cable Ship Company, Inc.
Transpacific Communications, Incorporated
195 Broadway Corporation
AT&T International Inc.
AT&T International United Kingdom—Limited
American Bell Inc., Services
Western Electric International, Incorporated
AT&T International Far East, Limited
Advanced Mobile Phone Service, Inc.
American Bell Inc.
American Telephone and Telegraph Overseas Finance N.V.
The Southern New England Telephone Company
Cincinnati Bell, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Western Electric Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit entered on March 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 1, 1982, is reported at 672 F.2d 381 (1982), and is reproduced at App. 1a-37a. The order entered on May 28, 1982, denying rehearing *en banc* by a vote of 6-4, is set out at App. 39a. The opinion of the district court in this matter is not reported, and is reproduced at Appendix 40a-41a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 1, 1982. App. 38a. A petition for rehearing, and a suggestion for rehearing *en banc*, was timely filed, and was denied, over the dissent of four of the ten circuit judges, on May 28, 1982. App. 39a. On August 12, 1982,

by order of Chief Justice Burger, the time for filing this petition was extended to September 7, 1982. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The justiciability requirement of Article III of the United States Constitution and relevant portions of Rules 23 and 24 of the Federal Rules of Civil Procedure are set forth at App. 43a-44a.

STATEMENT OF THE CASE

This lawsuit was instituted more than seven years ago, on May 14, 1975. The named plaintiffs [1] were six present and former employees of petitioner Western Electric Company, Inc., ("Western" or "Western Electric") who worked at two separate facilities in Arlington, Virginia. The complaint was filed as a class action on behalf of present and former employees and rejected applicants, even though none of the named plaintiffs had been rejected for employment by Western Electric. The complaint alleged race and sex discrimination in hiring, job assignments, and promotions at the two Arlington facilities.[2]

At a class certification hearing on October 31, 1975, based upon Western's arguments and the express representations by the named plaintiffs that none had ever been a rejected applicant, the district court certified a class that excluded rejected applicants. On November 14, 1975, without hearing further evidence or conducting a "rigorous analysis" of Rule 23's requirements, the district court *sua sponte* reversed itself and certified a class of black and female persons that included rejected appli-

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[1] Because there are two groups of respondents in this case, they are referred to by their status in the case (*i.e.*, either as "named plaintiffs" or "intervenors") rather than as "respondents."

[2] The action was brought under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and jurisdiction was premised on 28 U.S.C. § 1343(4) and 42 U.S.C. § 2000e-5(f)(3).

cants.[3] After a three-day trial on the merits in February 1976, the district court issued a memorandum opinion sustaining claims of discrimination in hiring, promotion, and job assignments.

On appeal, the Fourth Circuit unanimously reversed the class certification entered by the district court and vacated the findings of discrimination in hiring. 596 F.2d 99, 101-02, *cert. denied*, 444 U.S. 929 (1979) ("*Hill I*"). Relying on *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court held that the interests of the named plaintiffs were so different from the interests of rejected applicants "that the named plaintiffs [could] not properly maintain an action for redress of alleged discrimination in hiring." 596 F.2d at 102. The hiring findings were vacated because certification of the class to include applicants "was in error," *id.*, and the district court had "improperly considered" the hiring claims raised by the employee plaintiffs. *Id.* at 101. The court did not reach the merits of the hiring issues. As to those employee claims that were properly raised in the litigation, the Fourth Circuit reversed virtually all of the findings of discrimination in employment entered by the district court. *Id.* at 102-07.[4]

On January 17, 1980, more than nine months after the Fourth Circuit's decision in *Hill I* and nearly five years

[3] In a letter to counsel, the district court explained that its reversal was based on a "closer reading" of *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975). On appeal in *Hill I*, as discussed below, the Fourth Circuit determined that the district court erred by construing *Barnett* too broadly, and overruled *Barnett* as inconsistent with the decision of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

[4] The named plaintiffs petitioned the Fourth Circuit for a rehearing *en banc*, arguing, *inter alia*, that rehearing was warranted because the panel in *Hill I* failed to order that the record on hiring be held open to allow for post-remand intervention. This petition was denied without opinion on May 29, 1979. Plaintiffs' petition to this Court for a writ of certiorari was denied on October 29, 1979. 444 U.S. 929 (1979).

after the lawsuit began, three alleged applicants moved for permissive intervention in this lawsuit.[5] These applicants, represented by counsel for the original named plaintiffs, sought both certification as named representatives of a class of rejected applicants and reinstatement of the vacated hiring findings. After briefing and oral argument, the district court denied their motion. The district court held that the motion to intervene was untimely, and further found that the proposed intervention would unduly delay the litigation and prejudice the original parties. The district court determined that, in the circumstances of the case, it would be impractical to consider the intervenors' claims while simultaneously proceeding with the remedial phase of the original case.

Thereafter, the named plaintiffs and Western negotiated a consent decree settling all remaining matters with regard to present and former employees. The district court approved and entered the consent decree after a full hearing. No settlement of the hiring claims was reached, and both the named plaintiffs and the would-be intervenors appealed from the district court's decision denying intervention. On December 30, 1981, the district court entered a final order dismissing all claims and ending the litigation, with the exception of matters then on appeal before the Fourth Circuit.

On March 1, 1982, almost seven years after this litigation commenced, three years after the findings of hiring discrimination were vacated, and three months after all claims raised by the named plaintiffs on behalf of the class they were entitled to represent were dismissed with prejudice, a new panel of the Fourth Circuit, over the lengthy dissent of Judge Widener, vacated the interven-

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[5] One of the purported intervenors alleged that she sought work at one of Western's Arlington facilities in 1972 and 1973. The other two purported intervenors alleged that they first sought work with Petitioner in 1979, more than three years after the trial on the merits, at a different Western facility located in Landover, Maryland.

tion decision of the district court and remanded the case for further proceedings. 672 F.2d 381 (1982) ("*Hill II*"), App. 1a-37a.

Judge Phillips, writing for himself and District Judge Williams sitting by designation, first rejected the trial court's ruling that the motion for permissive intervention was untimely, and that intervention was impractical and would prejudice the rights of the existing litigants.[6] The majority opinion then held that the district court, in determining the propriety of permissive intervention, had failed to consider judicial economies that could be generated through intervention and reinstatement of the unreviewed class findings of hiring discrimination that had been vacated in *Hill I*. 672 F.2d 387, App. 9a.[7]

According to the majority, reinstatement of the vacated findings was possible because the holding in *Hill I* "was based entirely upon the *formal* lack of sufficient identity of interests between any class representatives and the non-hired members of the class." 672 F.2d at 391, App. 15a-16a (emphasis added). This "formal" lack of identity, according to the majority, created only a "technical" lack of adequate representation under Rule 23(a)(4). *Id.* at 389, App. 12a. Throughout its opinion, the majority stressed that this "technical" flaw was over-

[6] The majority opinion nonetheless recognized that additional litigation, delays, and prejudice would result from intervention, *see* 672 F.2d at 386-87, App. 7a-8a, but concluded that such prejudice "was given greater weight [by the district court] than *general experience warrants*." Id. at 387, App. 8a (emphasis added). In dissent, Judge Widener argued against reversal, on such theoretical grounds, of "an experienced trial judge who is intimately familiar with five years of extended litigation." *Id.* at 392, App. 19a.

[7] The majority in *Hill II*, like the court in *Hill I*, did not review the merits of the original hiring findings in considering the reinstatement issue. The reinstatement inquiry thus hinges upon findings that have never been reviewed, that were made in conjunction with several other findings on the merits that were reversed, and that predate by several years drastic changes decreed by this Court in the conduct of employment discrimination litigation.

come by the named plaintiffs' victory on the merits of the hiring issues, which allegedly proved that applicants were adequately represented during the litigation. The majority never addressed the commonality or typicality requirements of Rule 23(a)(2) or (a)(3), nor the more general Rule 23 requirement enunciated in *Rodriguez* that the named plaintiffs must be members of the class they seek to represent, nor did the court explain how purported success on the merits might cure these fundamental defects. Rather, the majority held that so long as class representatives (unqualified under *Hill I* and *Rodriguez*) prevail on the merits of overly broad class claims, fundamental defects in class composition and representation are only "formal" or "technical" matters, and findings previously vacated as outside the scope of the litigation can be reinstated through intervention of new class representatives. Judge Widener dissented from the majority opinion, concluding that it "trivialize[d] both *Hill I* and *Rodriguez* by [its] necessary implication that class composition is of little or no importance in Title VII litigation." 672 F.2d at 397, App. 28a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THIS COURT IN *EAST TEXAS MOTOR FREIGHT SYSTEM, INC. v. RODRIGUEZ* AND *GENERAL TELEPHONE CO. OF THE SOUTHWEST v. FALCON*, CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS, AND PRESENTS AN UNRESOLVED CONFLICT WITHIN THE FOURTH CIRCUIT.

The critical flaw in the decision below, and the most important reason why this Court should grant this writ, is the panel's holding that the lack of applicants among the named plaintiffs in this lawsuit created only a "technical" or "formal" defect in class composition and representation. In arriving at this conclusion, the court below completely ignored three vital factors—commonality, typicality, and membership by the named plaintiffs in

the class—that are called into question where, as here, none of the named plaintiffs suffered the same injury as, or were members of, the class they sought to represent. By ignoring these defects and improperly characterizing the error in the original trial solely as a matter of inadequate representation, the majority below was able to find that all "technical" defects in class composition and representation were cured through the success of the named plaintiffs on the merits of the hiring claims, and that the unreviewed prior hiring findings might be reinstated. The possibility of reinstatement, and the judicial economy the majority below envisioned as flowing therefrom, is the linchpin of the Fourth Circuit's ruling that the lower court erred in denying intervention, and is the primary focus of the remand instructions.[8]

The panel reached this decision without the benefit of this Court's ruling in *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982),[9] and by misconstruing the holding of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977). The opinion below is in direct conflict with these holdings, as well as the holdings of at least three circuit courts (discussed *infra* at pp. 11-13) on this issue.

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[8] 672 F.2d at 387-92, App. 15a-17a. Because the opinion below plainly found that the possibility of reinstatement was a vital factor not properly considered by the district court, and which had to be decided on remand in order to determine the propriety of granting intervention, this case is now ripe for review by this Court. No subsequent proceedings in the lower courts can rectify this fundamental error of law by the Fourth Circuit, as this error is the very cause of all further action in this case. Had the court below properly applied established law, as discussed *infra*, it would have ruled that reinstatement of the hiring findings was improper and thus would have had no basis for overturning the district court or ordering the convoluted inquiry now required on remand. This key error underlies all further proceedings in this matter, cannot be remedied by the courts below, and should be rectified by this Court now.

[9] *Falcon* was decided approximately three months after the decision in this case.

The holding in this case also presents a further example of the unresolved conflict within the Fourth Circuit regarding the proper requirements for class litigation. Last term, in light of this conflict and this Court's decision in *Falcon*, this Court granted certiorari in *Brown v. Eckerd Drugs, Inc.* and vacated and remanded that case for further consideration in light of *Falcon*. 102 S. Ct. 2952 (1982), *vacating and remanding* 663 F.2d 1268 (4th Cir. 1981). The present case is a sister case to *Brown* and rests on precisely the same doctrinal footing. This Court should grant certiorari in this case and entertain full argument, or, as in *Brown*, vacate and remand for further consideration in light of *Falcon*.[10]

A. The Decision Below Seriously Misconstrues *Rodriquez* and Contradicts *Falcon*.

In *East Texas Motor Freight System, Inc. v. Rodriguez*,[11] and in the recent holding in *General Telephone Co. of the Southwest v. Falcon*, this Court exercised its supervisory power to insure that employment discrimination class actions are maintained only by named plaintiffs who are members of a proper class, defined in strict accordance

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[10] If this Court vacates and remands this case, petitioner suggests that because of the continuing internal conflict within the Fourth Circuit, it would be appropriate and desirable that the remand be directed before the circuit *en banc*. *See, e.g., CAB v. American Air Transport, Inc.*, 344 U.S. 4, 5 (1952); *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942) (per curiam); R. Stern & E. Gressman, *Supreme Court Practice* 366 (5th ed. 1978).

[11] *Rodriguez* was one of three cases decided on the same day which, taken together, clarified and simplified several aspects of class action proceedings under Title VII. The other two cases in this trilogy were *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). As discussed *infra* at 19-20, the practical effect of the opinion below is to circumvent the standards set forth in this trilogy.

with all of the prerequisites of Rule 23. The holding in *Rodriguez* thus stated that named plaintiffs who are not members of the class they seek to represent do not " 'possess the same interest and suffer the same injury' as the class members . . . [and] simply [are] not eligible to represent a class of persons who did allegedly suffer injury." 431 U.S. at 403-04 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). And in *Falcon*, Justice Stevens, writing for the Court, held that present and former employees cannot maintain class litigation on behalf of rejected applicants without establishing "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 102 S. Ct. at 2373. This Court in *Falcon* based its ruling on the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), and distinguished the interests they serve from the adequacy requirement of Rule 23(a)(4). Moreover, Justice Stevens explicitly rejected the argument that success by the named plaintiff could "bridge [the] gap" and establish commonality and typicality for class claims as well. *Id.* at 2371-72.

The majority opinion below stands in irreconcilable conflict with the holding in *Rodriguez* that named plaintiffs must be members of the class they seek to represent. None of the named plaintiffs in this case was a member of the class of rejected applicants, yet the majority opinion in *Hill II* found reinstatement possible without even mentioning this fatal flaw. The holding below even more clearly conflicts with this Court's ruling in *Falcon*. The claims of the employee-plaintiffs in this case, like the claims of the plaintiff in *Falcon*, were directed at discriminatory treatment of employees and lacked any "typicality and commonality relationship" with the hiring claims premised on disparate impact upon applicants. As with class membership, the panel opinion sanctioned the possibility of reinstatement without even addressing these two key concerns.

The opinion below, by deliberately ignoring the vital issues of commonality, typicality, and class membership, stands in glaring contrast to this Court's admonition in *Falcon* that a "rigorous analysis" of the prerequisites of Rule 23 is mandatory in employment discrimination class actions, as well as this Court's statement in *Rodriguez* that "careful attention to the requirements of Fed. Rule Civ. Prac. 23 remains . . . indispensable." 431 U.S. at 405.

This Court has already granted review of a Fourth Circuit case that similarly misread *Rodriguez*, and was decided without the benefit of *Falcon*. In *Brown v. Eckerd Drugs, Inc.*, this Court vacated and remanded the decision of the Fourth Circuit for further consideration in light of *Falcon*. 102 S. Ct. 2952 (1982). Both *Hill II* and *Brown*, cases argued within three months of each other and in which the opinions were prepared concurrently,[12] share markedly similar facts,[13] and rest on the same doctrinal footing: that class membership, commonality, and typicality are unimportant in employment discrimination class actions. Neither case was decided with appreciation of the need for "rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 102 S. Ct. at 2373. In *Brown*, this disregard for the totality of Rule 23 was manifested in the majority's holding that all minority employees have an interest in a workplace free of employment discrimination, whether or not the named plaintiffs were injured in the same fashion as members of the class sought to be represented. 663 F.2d at 1275. In his

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[12] *See* 663 F.2d at 1296 (Russell, J. dissenting); *and see Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 974 n.18 (4th Cir. 1981).

[13] *Brown* and *Hill II* both involved situations where named plaintiffs were improperly permitted to litigate overly broad class claims. As in *Hill II*, *Brown* also involved post-trial intervention by a party for purposes of preserving favorable findings of fact made on behalf of an improperly certified class. *See* 663 F.2d at 1268, 1293-94.

dissent in *Brown*, Circuit Judge Russell observed that the majority had tacitly overturned *Hill I* and ignored *Rodriguez*, and had proceeded from the assumption that so long as named plaintiffs prevailed on the merits of class claims errors in the certification process were irrelevant. *Id.* at 1297. That erroneous premise became the holding in *Hill II*.

By vacating and remanding *Brown*, this Court clearly rejected the central premise underlying *Hill II*. As in *Brown*, this petition should be granted to ensure uniformity with the requirements of Rule 23 as construed by this Court.[14]

B. The Decision Below Conflicts with Established Authority in Other Circuits.

The Fourth Circuit's holding below—that success on the merits magically cures all defects in class composition and representation, and thus permits reinstatement of unreviewed findings on issues not properly litigated—has been squarely rejected by other circuit courts facing the issue. In *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), the Fifth Circuit refused to find that defects in class representation were "cured" by the named plaintiffs' success on the merits. The Fifth Circuit

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[14] *See* S. Ct. R. 17.1(c). Indeed, if *Hill II* was consistent with this Court's view of class actions, the success of the class representatives in *Brown* should have been determinative of their qualifications as class representatives, and *Brown* should not have been vacated and remanded.

Moreover, unless the writ is granted in this case, this Court's remand in *Brown* will be futile. Should the Fourth Circuit overturn its ruling in *Brown* on the basis of *Falcon*, so long as *Hill II* remains good law, intervenors will argue that success on the merits in *Brown* cures any "technical" or "formal" errors in the certification process. This Court's ruling in *Brown* will lose all meaning in light of the ever present possibility of post-remand intervention established by *Hill II*.

approved an order by the district court that prevented named plaintiffs, all of whom were black women, from representing a class including black men, on the grounds that the interests of the two groups were in conflict. Although the proof presented at trial established that both black men and black women were victims of racial discrimination, the Fifth Circuit refused to expand the scope of the class to include black men and "save" the favorable findings, simply because the plaintiffs succeeded on the merits. Judge Goldberg's dissent, which is virtually identical to the majority ruling in *Hill II*, graphically illustrates the conflict between *Payne* and *Hill II*.[15]

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[15] Judge Goldberg argued, without success, that

> [t]he district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that there existed a *potential* conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiffs' ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

673 F.2d at 837-38. Moreover, the disposition by the Fifth Circuit of the plaintiffs' motion for rehearing illustrates further the conflict between *Payne* and *Hill II*. In *Payne*, the plaintiffs moved the panel to modify its opinion to make clear that four black males could intervene "to remedy the defect in representation" found by the court and save the favorable findings. Plaintiff-Appellees' and Cross-Appellants' Petition for Panel Rehearing and Clarification, at 2-3 (May 27, 1982). The plaintiffs explicitly relied upon *Hill II* in support of their motion. On July 6, 1982, the panel in *Payne* denied the plaintiffs' motion for clarification and rehearing, and the entire court refused to hear the case *en banc*, rejecting conclusively the proposition that defects in fundamental requirements for class composition and representation can be "cured," and favorable findings "saved," through *ex post facto* intervention.

The Third and Ninth Circuits also have rejected the approach espoused by the Fourth Circuit's split decision in *Hill II*. In *Gurmankin v. Costanzo*, 626 F.2d 1132 (3d Cir. 1980), the Third Circuit expressly relied on *Rodriguez* and Rule 23 in rejecting a plaintiff's claim that successful proof of classwide discrimination warranted reversal of an earlier decision to deny certification. And, in *Black Faculty Association of Mesa Community College v. San Diego College District*, 664 F.2d 1153 (9th Cir. 1981), although the district court found that the defendants had engaged in classwide racial discrimination in hiring, the Ninth Circuit refused to authorize classwide relief because none of the plaintiffs had standing to sue on behalf of the applicant class. Relying upon *Rodriguez*, the court vacated the judgment and dismissed the case, thereby rejecting the principle that mere success on class claims cures underlying defects in class composition.

These cases, coupled with *Rodriguez* and *Falcon*, establish that in employment discrimination class actions all of the prerequisites of Rule 23 must be met, and that success on the merits of claims that were improperly entertained in the first instance is not a substitute for compliance with Rule 23. *Hill II* stands alone in its insistence that success on the merits obviates all defects in class composition or representation.

C. The Decision Below Furthers an Unresolved Division Within the Fourth Circuit That Should Be Addressed By This Court.

The decision below, like the Fourth Circuit's decision in *Brown*, is one of several examples of the continuing conflict within the Fourth Circuit over the proper conduct of employment discrimination class actions. This conflict, over a vital and recurrent issue, demands this Court's attention.[16]

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[16] Because the intra-circuit conflict relates to recurring and important issues of employment discrimination law, and because so

The theory underlying *Hill II* and *Brown* has surfaced in other panel opinions of the Fourth Circuit,[17] and without action by this Court will continue to appear depending on the composition of any one panel. The conflicting decisions in *Hill I* and *Hill II* are but one example of this conflict. In some cases—*Brown* and *Hill II*—fundamental disregard for the importance of Rule 23 represents the majority approach. In other cases—such as *Abron v. Black & Decker*—a different panel has rejected this reasoning. Because this conflict has not been reconciled through petitions for rehearing *en banc*,[18] it should be remedied once and for all by this Court. Otherwise, the state of the law in the Fourth Circuit will remain in the intolerable condition described by Judge Russell, dissenting in *Brown*: "Confusion in the law for both litigants and

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many cases have resulted in closely divided *en banc* determinations, *infra*, an appropriate basis exists for a grant of certiorari. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 275-77 (5th ed. 1978) (cases cited therein).

[17] *See Abron v. Black & Decker (U.S.) Inc.*, 645 F.2d 951 (4th Cir. 1981), *modified*, 27 Empl. Prac. Dec. (CCH) ¶ 32,368 (4th Cir. 1982); *Chisholm v. United States Postal Service*, 665 F.2d 482, 493 n.14 (4th Cir. 1981). The source of this conflict is the firmly held conviction by a number of judges in the Fourth Circuit, as expressed by Judge Murnaghan dissenting in *Abron v. Black & Decker (U.S.) Inc.*:

> Where . . . a class [has] been certified [and a] trial has been held and the meritorious nature of the class claims established, . . . it is especially grievous to the members of the class . . . to destroy its legal status *because of a supposed technical defect in the representative's standing.*

654 F.2d at 975 (emphasis added).

[18] In *Abron v. Black & Decker*, in which the majority followed *Rodriguez* and ruled that a named plaintiff lacked standing to maintain a class action on behalf of class members suffering different injuries, the Fourth Circuit was evenly divided on whether to grant rehearing *en banc*. Several months later, the circuit again split evenly on whether to grant rehearing *en banc* in *Brown*, a case expressly repudiating the decision in *Abron*. And in *Hill II*, a decision adopting the same improper approach as in *Brown*, the vote against rehearing *en banc* was 6-4. App. 39a.

district courts, [with] the rights of the parties [left] to depend on the panel as constituted . . . ." 663 F.2d at 1299.

D. The Practical Effect of the Opinion Below Is to Permit Spurious Class Actions and Unrestrained Litigation That Will Tax Judicial Resources in All Areas of Substantive Law in All Circuits.

By establishing "success on the merits" as a cure for defects in class composition and representation, the majority in *Hill II* has stood accepted practice in class actions on its head. The guiding principle in class litigation is that the scope of the claims that may be adjudicated depends upon the nature and scope of the issues that the named plaintiffs have authority to raise, and that this must be determined at the outset of litigation.[19] Under Rule 23, the identity of the parties determines the scope of the issues to be litigated, rather than the scope of the issues determining the identity of the parties. By turning accepted practice around, the Fourth Circuit has established a form of class representation that grants any litigant a trial run on any class action claim, and then permits class counsel, if successful on the merits of claims that should not have been litigated in the first instance, to obtain intervenors and thereby legitimate the proceedings. Such an interpretation is simply not "consistent with the general policies embodied in Rule 23," and should be reviewed by granting this writ. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); S. Ct. R. 17.1(a).

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[19] Rule 23 explicitly requires the trial court to determine the scope and nature of class claims "as soon as practicable after the commencement of an action as a class action," precisely to insure that the issues that may be litigated are framed properly in advance of litigation, that judicial resources will be used effectively and efficiently, and that a binding class judgment will result. For the same reason, Rule 23 provides that the court may issue a conditional certification order and may reconsider its certification order, but only "before the decision on the merits."

1. *The Opinion Below Countenances Spurious Class Actions.*

The 1966 Amendments to the Federal Rules were specifically designed to end the abuses of spurious class actions and prevent one-way intervention after a determination on the merits against a defendant.[20] Under the reasoning of *Hill II*, however, applicants can intervene after trial and reap the benefits of the prior favorable findings, although they would never have been bound by an adverse ruling in the litigation because the named employee-plaintiffs were not proper class representatives.[21] In other words, under the Fourth Circuit rationale improper certification redounds only to the benefit of the intervenors: they can use it to avoid an adverse determination on the merits, or use it as a basis for reinstating favorable findings on a motion to intervene.[22]

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[20] Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 105-06 (1966). *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-47 (1974) (under old rule class members could await final judgment on the merits to determine whether participation would be favorable; members of class could benefit unfairly from favorable judgment without subjecting themselves to binding effect of unfavorable one).

[21] *See generally Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968) (judgments in overly broad class actions subject to due process attack by class members).

[22] Under these circumstances, the observation of then Judge, now Justice, Stevens, in his dissent in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1207 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), is particularly appropriate:

> At a minimum, [Rule 23] requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair.

The result in *Hill II* is no less unfair insofar as it allows intervenors to claim the benefits of improperly made findings. *See also*

2. *The Opinion Below Will Result in Unrestrained Class Litigation.*

Apart from establishing a rule of class action law manifestly unfair to defendants, the holding in *Hill II* will tax the resources of the judiciary immeasurably. Because control of class actions need not be established at the initiation of litigation through proper certification procedures,[23] class actions will assume an independent life, and extend for so long as new parties are willing to intervene as class representatives and claim the benefits of jurisdictionally defective findings. Moreover, at the time of such intervention, district courts will be forced into precisely the posture rejected by this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). In *Eisen*, this Court in construing Rule 23

Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982) (finality should not depend on which party prevails); *and see Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 353-54 (1980) (Powell, J. dissenting).

The rule devised in *Hill II* far exceeds opportunities available to litigants initiating new litigation under the doctrine of offensive collateral estoppel. The panel in *Hill II* acknowledged abundant authority that vacated findings, such as those in *Hill I*, would "have no vitality as precedent or res judicata in other litigation." 672 F.2d at 387, App. 9a. According to the panel, however, this authority did not apply to reinstatement in the same action. *Id.* at 388, App. 9a-10a. This distinction is without logic or reason, *see id.* at 398, App. 31a (Widener, J. dissenting), and results in the reappearance of the spurious class action.

[23] In fact, as pointed out by Judge Russell in his dissent in *Brown*, the natural consequence of *Hill II* is that in all but the clearest cases, class certification proceedings will become perfunctory exercises and prudent district courts will certify, on a *pro forma* basis, as broad a class as possible. If a district judge is presented with a close question as to class composition or representation, the rationale of *Hill II* dictates that judicial economies lie in broad certification and trial of as many claims as possible, with post-judgment intervention allowed to cure the defects. As Judge Russell emphasized in his dissent in *Brown*, the result "would mean that Rule 23 would be without meaning or effect and would be just a jumble of words stated in hypocritical mandatory terms." 663 F.2d at 1297.

expressly disapproved of examining the merits of the litigation and structuring the class accordingly. The concerns of this Court in *Eisen* are more than warranted under the decision in *Hill II*, which approves structuring the class on the basis of an actual (although vacated) judgment—not simply a provisional ruling on the merits as in *Eisen*.[24]

The novel intervention theory set forth in *Hill II* rewards gamesmanship by class counsel. There was no reason why applicants could not have been secured as named plaintiffs at the initiation of this lawsuit seven years ago in 1975.[25] In 1979, after final adjudication of all issues the named plaintiffs could properly present, counsel for the plaintiffs first secured intervenors to pursue claims that had been ruled outside the scope of the litigation. This case now continues despite the final adjudication and dismissal of all claims the original named plaintiffs had authority to bring. The unreviewed applicant class claims in this case thus have developed a life of their own and continue to search for a proper

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[24] The opinion below also threatens the basic premise underlying the restriction by this Court on appeals of class certification decisions. This Court has consistently held that interlocutory appeals are unnecessary and that errors in class certification can be remedied properly after completion of the proceedings below. Under the panel opinion, however, appeal as of right after completion of the case is a useless exercise, and erroneous grants of class certification are in effect unreviewable. Even if the class certification ruling is reversed on appeal, as in *Hill I*, adverse classwide findings on the merits may be used as a basis for post-judgment intervention. Thus under *Hill II* interlocutory appeals, as soon as the plaintiffs prevail on a class certification motion, stand as the only practical method of review.

[25] All of the purported intervenors are represented by counsel for the named plaintiffs, and one of the purported intervenors is the sister of an original named plaintiff who has averred that she was aware of the litigation. The two other purported intervenors did not apply for work at Western Electric until 1979, more than three years after the trial on the merits.

plaintiff, despite the opinion in *Hill I* establishing that, as a matter of law, they should never have been part of the case.[26]

Finally, the decision below squarely conflicts with this Court's efforts to insure that employment discrimination litigation is conducted in accordance with the federal rules and the statutory framework established by Congress. In the trilogy of cases decided during the 1976 Supreme Court term,[27] as amplified by the decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Falcon*, *supra*, this Court has established parameters to insure that Title VII cases, and particularly class actions, remain reasonable and manageable. This Court has done this by, *inter alia*, limiting eligibility to represent a class to those who are members of the class and suffer the same injury as class members (*Rodriguez* and *Falcon*), carefully structuring the allocation and burden of proof (*Burdine*), and refusing to countenance an overbroad theory of "continuing violations" that would have revived stale claims (*Evans*). The decision in *Hill II* is totally inconsistent with this Court's emphasis on careful and structured management of employment discrimina-

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[26] As emphasized by Judge Widener in his dissent in this case,

> [I]n the case now before this court, there was no classwide [hiring] liability legitimately adjudicated in the initial case because, as this court held in [*Hill I*], the class was overly broad and thus not properly constituted.
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> * * *
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> The named plaintiffs [in *Hill I*] were never part of the class of disappointed applicants for employment and thus certification never should have occurred.

672 F.2d at 393, 397, App. 20a, 28a. Class counsel recently informed the defendant of their intention to file yet another motion to intervene on behalf of a new putative intervenor.

[27] *See* n. 11 *supra*.

tion litigation, and thus should be addressed by this Court.[28]

II. THE DECISION BELOW PRESENTS NOVEL AND FUNDAMENTAL QUESTIONS CONCERNING THE JURISDICTION OF FEDERAL COURTS AND CONFLICTS WITH OTHER DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS.

A. The Decision Below Conflicts with the Holdings of This Court.

The decision below not only contravenes the central tenets of Rule 23, it raises an issue of substantial significance under Article III regarding class action litigation that warrants the attention of this Court.[29] The original named plaintiffs in this case were all employees, and never satisfied the fundamental requirement of membership in the applicant class. As the court in *Hill I* explicitly held, these employees did not suffer the

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[28] There is an additional ground for this Court to exercise its supervisory powers and grant this writ. The panel in *Hill II* completely disregarded the law of the case doctrine. This Court has recognized this doctrine as an essential and longstanding rule of practice within the federal judiciary, designed to insure finality and guard against panel shopping within appellate tribunals. *See, e.g., United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186 (1950). In *Hill I*, the first panel vacated the hiring findings and failed to provide for post-remand intervention, thus clearly establishing, as the law of this case, that the classwide hiring findings were without any legal basis or significance. *See EEOC v. International Longshoremen's Ass'n*, 623 F.2d 1054, 1058 (5th Cir. 1980), *cert. denied*, 451 U.S. 917 (1981). By ignoring the law of the case, the panel in *Hill II* has encouraged panel shopping, discouraged the voluntary settlement of class litigation, and clearly departed from the usual and accepted course of judicial proceedings.

[29] S. Ct. R. 17.1(a), *see United States Parole Commission v. Geraghty*, 445 U.S. 388, 390 (1980); *cf. Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982) (refusal by state court to apply traditional jurisdictional principles to multistate class suit).

same injury or possess the same interests as applicants. Yet, in *Hill II*, the lower court dismissed this prerequisite to class representation as "less fundamental than a pure jurisdictional requirement." 672 F.2d at 388, App. 10a.

In *Blum v. Yaretsky*, 102 S. Ct. 2777 (1982), this Court stated that "[i]t is axiomatic that the judicial power conferred by Art. III may not be exercised" unless class representatives establish they are members of the class they purport to represent. *Id.* at 2783.[30] Because the named plaintiffs in *Blum* failed to meet this fundamental requirement, this Court held that the district court had "exceeded its authority in adjudicating" class claims, and that favorable findings entered on behalf of the class were "wholly gratuitous and advisory." *Id.* at 2784-85. The assertion by the panel in *Hill II* that class membership is "less fundamental than a pure jurisdictional requirement" and that void class findings may be far more than "gratuitous and advisory" directly conflicts with the clear holding of this Court in *Blum*.[31]

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[30] *Blum* was decided approximately four months after the decision in *Hill II*, and the Fourth Circuit's failure to benefit from the holding in *Blum* is yet another reason to grant this petition.

[31] The need for class membership and common injury finds its origins in the justiciability requirements of Article III of the Constitution. To insure a case or controversy suitable for adjudication the class representative must establish his own personal interest, which must be shared by the members of the class. As stated by Chief Justice Burger,

> [A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (opinion of Burger, C.J.). *See also Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 102 S. Ct. 752 (1982); *City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981) (Rehnquist, J.,

Moreover, the holding in *Hill II* that defects in class composition and representation may be cured and that vacated hiring findings can somehow be resuscitated directly conflicts with the holding of this Court that findings of fact made without jurisdiction are void *ab initio*. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court explicitly held that a court without jurisdiction to hear a case "was without authority to decide the merits." 449 U.S. at 379. This Court indicated that orders entered without jurisdiction lack any force or effect and cannot be cured, for "by definition, a jurisdictional ruling may never be made prospective only." *Id.* Subsequent decisions by this Court have emphasized the central holding of *Firestone*, and highlight further the error of the court below.[32]

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in chambers) (application for stay granted), *cert. granted*, 102 S. Ct. 1426 (1982); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976); *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

This Article III requirement is incorporated in, and congruent with, the initial requirement of Fed. R. Civ. P. 23(a) that "one or more members of a class may sue. . . ." *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 & n.3 (1974); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962); *Feldman v. Simkins Indus., Inc.*, 679 F.2d 1299 (9th Cir. 1982); *Machella v. Cardenas*, 653 F.2d 923 (5th Cir. 1981); *see generally*, 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1761 (1972).

[32] *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 102 S. Ct. 1357, 1365 n.10 (1982) (Marshall, J.) ("[i]t is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over the relevant parties"); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982) (White, J.) ("[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties").

By ignoring established authority, and by sanctioning jurisdiction without class membership, the holding below embraces the

B. The Decision Below Conflicts with Decisions Throughout the Circuits.

The decision below directly conflicts with the holdings of the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the D.C. Circuit, and the Court of Claims. All these appellate tribunals have held that judgments entered without jurisdiction are void.[38] Moreover, the Third Circuit

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extreme rejected by this Court in *United States Parole Commission v. Geraghty*: premising jurisdiction on " 'the bare existence of a sharply presented issue in a concrete and vigorously argued case' . . . ." 445 U.S. at 406 n.10 (quoting Justice Powell's dissent, *id.* at 421) (1980). The holding of this Court in *Geraghty* never addressed the issues raised in this case. *Geraghty* dealt with mootness and efforts to appeal an erroneous denial of class certification, by a named plaintiff who was clearly a member of the putative class at the time certification was improperly denied. Similarly, neither do the Fourth Circuit's "headless class" cases, *e.g., Simmons v. Brown*, 611 F.2d 65 (4th Cir. 1979), support the plaintiffs' position. These cases again involve an erroneous *denial* of class certification entered at a time when the named plaintiff was apparently a proper representative. In *Hill II*, however, "[t]he named plaintiffs were never part of the class of disappointed applicants and . . . certification never should have occurred." 672 F.2d at 397, App. 28a (Widener, J. dissenting).

[38] *See, e.g., Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918-19 (3d Cir. 1981); *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 821-24 (10th Cir. 1981); *Hydaburg Cooperative Ass'n v. United States*, 667 F.2d 64, 66 (Ct. Cl. 1981); *Alabama Hospital Ass'n v. United States*, 656 F.2d 607 (Ct. Cl. 1981), *cert. denied*, 102 S. Ct. 2006 (1982); *Bank of Montreal v. Olafsson*, 648 F.2d 1078, 1079-80 (6th Cir.), *cert. denied*, 102 S. Ct. 641 (1981); *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974); *Nader v. Volpe*, 466 F.2d 261, 265 (D.C. Cir. 1972); *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968).

The majority in *Hill II* attempted to distinguish many of these cases on the ground that they apply to efforts to use jurisdictionally void judgments in subsequent litigation, not the same action. As Judge Widener stated in his dissent, "[T]he difference is really immaterial," and that "[l]ogically it makes little difference whether the attempted subsequent litigation is a continuation of the same action or is a separate action." 672 F.2d at 398, App. 32a. Indeed,

in *De Nafo v. Finch*, 436 F.2d 737 (3d Cir. 1971), and the Tenth Circuit in *City & County of Denver v. Matsch*, 635 F.2d 804 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981), have directly held, contrary to *Hill II*, that litigants cannot reinstate or cure jurisdictionally void findings in the same litigation.[34]

III. THIS CASE PRESENTS CRITICAL QUESTIONS REGARDING THE RESPONSIBILITY AND AUTHORITY OF TRIAL COURTS TO SUPERVISE CLASS ACTION LITIGATION AND CONFLICTS WITH PRINCIPLES REPEATEDLY SET FORTH BY THIS COURT AND EVERY CIRCUIT.

Under the holdings of this Court, and every circuit that has confronted the issue, district courts are afforded broad discretion in disposing of motions for permissive

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the entire premise of the attempted intervention in this case is to avoid the normal principles of *res judicata* and collateral estoppel, which would preclude reinstatement of a void judgment in new litigation.

[34] The sole case law relied upon by the panel in *Hill II* for the proposition that jurisdictional defects can be cured, *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954), is not applicable to the Article III and Rule 23 issues in this case, and as Judge Widener emphasized has been effectively overruled by this Court in *Firestone Tire & Rubber Co. v. Risjord*, *supra*. *See Hill II*, 672 F.2d at 397-98, App. 29a-32a (Widener, J. dissenting).

Nor does *Mullaney v. Anderson*, 324 U.S. 415 (1952), the principal case relied upon by plaintiffs, apply to the issues in this case. *Mullaney* applied a real-party-in-interest analysis and permitted a last minute amendment of a defective pleading before this Court by union agents clearly authorized by union members to litigate on their behalf. In *Hill II*, however, the plaintiffs never had the capacity to litigate on behalf of applicants, and, as held by the Tenth Circuit in *City & County of Denver v. Matsch*, *supra*, efforts to "cure" jurisdictionally defective findings under such circumstances are impermissible.

intervention.[35] Moreover, the majority of circuit courts to consider the issue have adopted the corollary rule that a movant for post-judgment permissive intervention must offer a substantially stronger showing than usual to prevail.[36]

In this case, the district court, in light of its five years of experience overseeing an exceptionally complex piece of litigation, denied the post-remand motion to intervene on the grounds that it was untimely and would prejudice the existing class members and unnecessarily complicate and delay completion of the case. Rather than enter a "routine per curiam dismissal of the appeal," 672 F.2d 392, App. 18a (Widener, J. dissenting), the Court of Appeals explicitly refused to follow prevailing legal standards.

First, in finding that the district court afforded timeliness and prejudice to the original parties more weight than "general experience" would warrant, the Fourth Circuit rejected the fundamental premise that Rule 24(b)

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[35] *See NAACP v. New York*, 413 U.S. 345, 366 (1973); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982); *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982); *United States v. Louisiana*, 33 Fed. R. Serv. 2d 1119 (5th Cir. 1982); *Washington Ass'n for Retarded Citizens v. Thomas*, 33 Fed. R. Serv. 2d 177 (9th Cir. 1981); *Michigan Association for Retarded Citizens v. Smith*, 657 F.2d 102 (6th Cir. 1981); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *see generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1913, 1923 (1972).

[36] *See, e.g., Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977); *EEOC v. United Air Lines, Inc.*, 515 F.2d 946 (7th Cir. 1975).

is a device entrusted to the discretion of the trial court because the trial court is in the best position to gauge the impact of permissive intervention on the orderly processing of the case. This usurpation of the role of the district court, and disregard for findings of a factual nature made by the district court regarding the effects of intervention, are contrary to recognized limits on the authority of appellate tribunals. This is particularly true where, as here, the appellate court can point to no improper findings in support of its ruling, but rather only to a theoretical disagreement over the impact of intervention upon the course of litigation. This Court has consistently addressed through grants of certiorari such deviations from proper standards of appellate review. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182 (1982); *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982); *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252 (1981).

Second, the Fourth Circuit deviated from the three express statutory criteria for permissive intervention—timeliness, common questions of law or fact, and prejudice to rights of the original parties—and added a novel factor, reinstatement of previously vacated findings. Consideration of this factor is totally unwarranted under the language of Rule 24(b), and antithetical to the efficient conduct of class actions by district courts under Rule 23. More than seven years after this complaint was filed, the parties are now required to litigate in an intervention proceeding issues that were supposedly resolved long ago in class action proceedings under Rule 23.[37] The burden such novel and unending class litigation places on the federal court system is simply unauthorized under Rule 24(b), and unnecessary, and should not be countenanced by this Court.

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[37] A preliminary sample of such issues includes, *inter alia*, whether the intervenors are formally qualified to represent any class, and whether the intervenors can represent the class previously certified in error.

CONCLUSION

For the reasons set forth in this petition, Petitioner requests that this Court grant its Petition for a Writ of Certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of *Falcon*, as was done last term in *Brown v. Eckerd Drugs, Inc.*

Respectfully submitted,

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